No. 89-1448

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,
v.
DORIS I. SANDBERG, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AND AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC. IN SUPPORT OF PETITIONERS

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the American Corporate Counsel Association and the American Society of Corporate Secretaries, Inc. respectfully move for leave to file the attached brief amicus curiae. Counsel for petitioners has granted consent to file. Consent was requested from counsel for respondents, but no response to that request has been received.

The American Corporate Counsel Association ("ACCA") is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business entities in the private

sector. ACCA has approximately 7,800 members employed as corporate counsel by some 3,500 organizations and 34 local chapters across the country. Many of these members are the chief legal officers of their client corporations. ACCA's members are intimately involved in giving legal advice and formulating company policy on disclosure matters and in advising management on pending litigation.

The American Society of Corporate Secretaries, Inc. ("ASCS") is a professional association which was formed over 40 years ago and which is composed principally of corporate secretaries, corporate counsel and other business executives involved in duties normally associated with the corporate secretarial function. ASCS's 3,300 members, representing more than 2,400 corporations in the United States and Canada, are frequently responsible for the proper conduct of board of director meetings and the solicitation of proxies on behalf of the corporations they serve. Many ASCS members are officers of the corporations they represent; some are also members of ACCA.

In their professional activities, members of ACCA and ASCA are confronted on a regular basis with issues concerning the disclosure of material facts required by the federal securities laws, including federal proxy legislation. Thus, the members of ACCA and ASCS have a strong interest in defending state corporate governance statutes that limit civil liabilities of corporate officers and directors. Like 37 other states, Virginia has placed a ceiling on directors' and officers' liabilities to encourage competent persons to assume positions of responsibility in business corporations and to avoid chilling their performance of their duties. The sweeping implied cause of action recognized by the lower court in this case nullifies these statutory protections and exposes the clients of ACCA and ASCS members to liabilities that are contrary to state public policy.

The attached brief amicus curiae addresses the federalism issues raised by the court of appeals' ruling from the perspective of persons who have direct experience with the practical impact of stockholder litigation and state legislation designed to place reasonable constraints on such litigation.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AND THE AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

As explained in the foregoing motion for leave to file a brief amicus curiae, the American Corporate Counsel Association ("ACCA") and the American Society of Corporate Secretaries, Inc. ("ASCS") have a strong interest in the issues raised by the petition for a writ of certiorari. The court of appeals' ruling raises significant uncertainties regarding the corporate responsibilities of members of both organizations and also frustrates state legislation designed to protect the officers and directors

they counsel against unconstrained liabilities harmful to shareholders, depositors, and employees of affected companies.

SUMMARY OF ARGUMENT

By its recognition of an implied federal cause of action exceeding the scope of prior decisions of this Court and other circuits, the court of appeals has disregarded legislation of the Commonwealth of Virginia designed to protect against the adverse effects of open-ended civil liabilities for corporate officers and directors. This Court has warned against creation of implied causes of action that usurp the public policies embodied in state laws and has insisted on the application of principles of federalism in this very context. The Fourth Circuit's disregard of these principles of federalism brings its ruling into conflict with this Court's decision in *Santa Fe Industries v. Green*, 430 U.S. 462 (1977).

The Virginia corporate governance statutes that have been circumvented by the Fourth Circuit's ruling do not stand alone. Thirty-seven other states have adopted similar laws as part of recent corporate law reform initiatives. These statutes protect shareholders, depositors and employees of affected companies by constraining liabilities that deter competent persons from assuming positions of responsibility in business corporations.

The court of appeals not only has overridden state law and policy by its broad construction of the federal securities laws, but also has rendered a decision that is certain to impair the quality of disclosure in proxy statements. The court's ruling joins together vague substantive standards and unrestrained civil liability. By combining unpredictable legal requirements with unlimited personal liability, the court has placed enormous pressure on persons who make use of the proxy system to fill their disclosure documents with exculpatory rhetoric that is distracting and confusing to investors and that obscures the communication of material factual information.

ARGUMENT

I. THE IMPLIED RIGHT OF ACTION RECOGNIZED BY THE COURT OF APPEALS NULLIFIES STATE LAW AND CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM.

The substance of the complaint in these cases is that minority shareholders of the First American Bank of Virginia received inadequate compensation for their shares when the bank merged with a subsidiary of its parent company holding 85% of the outstanding shares, and that the bank's directors labored under a conflict of interest when they approved the merger. These are the traditional elements of a state-law complaint for appraisal or breach of fiduciary duty.

However, the Fourth Circuit has stretched these state-law claims into federal securities claims. First, the court found that the bank's directors engaged in securities fraud by failing in the proxy statement to characterize their own conduct as a breach of fiduciary duty and by affirmatively characterizing the transaction they approved as "fair." Second, the court found that millions of dollars in damages must be paid for the alleged defects in the proxy statement, even though the individual plaintiffs concededly had not relied upon the proxy statement (indeed, had affirmatively voted against the proposed merger), the vote of the minority shareholders could not have influenced the merger, and the shareholders had tried without success to enjoin the merger or secure an appraisal remedy in state court.

The practical effect of "federalizing" this controversy is to nullify carefully considered policy determinations of the Virginia legislature and to encourage the circumvention of state courts in the resolution of state-law claims. As explained by the Virginia Circuit Court, the Virginia General Assembly, in order to protect depositors against impairment of bank capital, has withheld an ap-

praisal remedy of the very type now mandated by the Fourth Circuit. Pet. App. 32a. Moreover, the Virginia legislature has placed a cap on the liability of corporate directors at $100,000 (or one-year's compensation) to protect against unlimited personal liabilities. *Id.* at 23a. The Fourth Circuit's creation of an implied remedy under the federal securities laws end-runs both of those limitations. Ironically, the court below acknowledged that these limitations applied precisely to this fact situation, yet it applied them only to the stockholder's state-law claims and placed no limitations whatsoever on their "implied" federal cause of action. *Id.* at 23a, 29a.

The Fourth Circuit's expansive ruling threatens to undermine not only the legislative policies of the Commonwealth of Virginia, but also those of many other states that have struggled to restrain the sharp escalation in directors' liability. If state-law claims may be transmuted into securities claims by the boot-strap theories employed in these cases, the corporate law of these states will suffer serious and unjustifiable injury.

As this Court has explained, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to shareholders, state law will govern the internal affairs of the corporation." *Santa Fe Industries, Inc. v. Green*, 530 U.S. 462, 479 (1977). "A state has an interest in promoting stable relationships among the parties involved in the corporation it charters, and [e]very state in this country has enacted laws regulating corporate governance." *CTS Corps. v. Dynamics Corp.*, 481 U.S. 69, 89, 91 (1987). Among the most important corporate governance statutes enacted in the last decade are laws designed to shield corporate directors against excessive civil liabilities.

When Virginia passed its director liability law, "the market for directors' and officers' liability insurance was in disarray." Goolsby, *Virginia Corporation Law & Practice* 10.1, p. 126 (Prentice-Hall). The people of Virginia perceived a pressing need for liability reform because of "genuine concern that a mistake in judgment, when viewed with the benefit of hindsight, could trigger financial ruin for individual directors." *Id.* at 127. The Virginia General Assembly responded by imposing a mandatory cap on liability and by allowing shareholders to further reduce damages exposure by amending corporate bylaws. The legislature made an exception only for "knowing" and "willful" misconduct. Va. Code Ann. §13.1-692.1.[1]

Virginia's law is indicative of a national trend. "One of the principal themes of corporate governance in the second half of this decade has been protection of corporate directors and officers from personal liability for money damages." Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988). In addition to Virginia, Delaware, and Indiana—the first states to adopt such laws—"forty other states have adopted some form of legislation designed to reduce the risks of directors' personal liability for money damages." *Id.* at 1209. Some of these states have adopted self-executing limitations on liability. Others authorize shareholders to adopt their own limitations. *Id.* at 1210. Regardless of

[1] The Virginia act applies broadly to "any proceeding" brought by or on behalf of shareholders against corporate officers or directors. The legislature withdrew protection only in narrow circumstances. "Because the unprotected conduct involved intentional wrongdoing, the business leaders were not concerned that such conduct would trigger unlimited liability." Goolsby, *supra* at p. 127, n. 13. Many other states withdraw protection only from willful and wanton conduct. *See, e.g.*, Nev. Rev. Stat. § 78.036(1) (Supp. 1989) ("intentional misconduct, fraud or a knowing violation of law"); Ind. Con. Ann. § 23-1-35-1(e) Burns Supp. 1988) ("Willful misconduct or recklessness"); Ohio Rev. Code Ann. § 1701.59(D) Anderson Supp. 1989) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation").

form, these laws indicate a growing national concern with respect to this area of corporate governance.

The state legislatures adopting these statutes did not do so with the intent to provide self-serving prescriptions for the personal welfare of corporate directors. Rather, these laws were enacted to protect the welfare of *shareholders* by ensuring that they receive the benefit of competent management and reasonable insurance costs. As a result of escalating liability triggered by expansive judicial rulings in the early part of the past decade, director and officer (D&O) insurance became prohibitively costly. "For many companies, especially start-up and smaller companies, the insurance was no longer affordable, and some companies were not able—and may still be unable—to obtain quotes at any price. According to *The Wall Street Journal*, premiums for D&O insurance increased over 360% in one year. Almost immediately, outside directors of many major publicly-held corporations began to resign or not stand for reelection rather than continue to serve with inadequate or no insurance." *Id.* at 1209.

Staggering liability risks for board members have had a deleterious impact on the welfare of the companies they serve. "With the onslaught of litigation and lack of protection, some corporations have found it harder not only to prevent directors from resigning, but also to attract talented board members." Note, *New York's Responses to the Director and Officer Liability Crisis*, 54 Brooklyn L. Rev. 1305, 1315.[2] In view of the overriding need to retain qualified directors and to purchase insurance at reasonable cost, shareholders have voted overwhelmingly to protect their interests by exercising statutory options to limit directors' liability. See Note, *The*

[2] This study notes that "[w]hen the Armada Corporation's D&O Policy was cancelled last year, 80 percent of the Board's members resigned in fear of personal liability exposure." *Id.* at 1316 n. 62.

Limitation of Directors' Liability: A Proposal for Legislative Reform, 66 Tex. L. Rev. 411, 438 (1987) ("Of the corporations that presented or plan to present charter provisions to shareholders under the new Delaware law, initial signs indicate that nearly ninety percent [of those corporations] have opted for no-liability provisions.").[3]

The broad-based reform movement to rationalize liability rules applicable in stockholder litigation would suffer a stunning setback if the Fourth Circuit's judgment in this case were permitted to stand. By inviting into federal court what is actually a controversy over breach of fiduciary duty, the Fourth Circuit has eviscerated Virginia's policy determination that appraisal remedies should *not* be available in bank merger cases and that individual directors should *not* be exposed to unconstrained class action liabilities. It also has encouraged litigants wishing to sidestep state courts to bring their state-law complaints in an already overburdened federal court system under an implied cause of action theory. It is a profound understatement to say, as in *Santa Fe Industries*, that "this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law." 430 U.S. at 479.

II. THE UNRESTRAINED LIABILITIES AND VAGUE SUBSTANTIVE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS THREATEN TO DEGRADE THE QUALITY OF DISCLOSURE IN PROXY STATEMENTS.

In addition to nullifying state law and policy, the Fourth Circuit's decision is certain to impair the quality of disclosure in corporate proxy statements. This conse-

[3] The chart set forth in the appendix of this brief summarizes liability restrictions in 37 states. The policies of those states would be circumvented by the Fourth Circuit's ruling in this case. That ruling could be used to transform almost any claim of breach of fiduciary duty into a federal securities case. Evasion of state law liability limitations would become an exercise in artful pleading.

quence flows from the debilitating combination of unlimited personal liabilities and unpredictable legal requirements approved by the court of appeals. In this litigation, $13,000,000 may change hands based on a jury's disagreement with the proxy statement's selection of adjectives and its expression of opinion on the issue of financial fairness. To make matters worse, the court has countenanced the jury's speculation that some individuals on the 21-member board of directors in this case possessed hidden subjective motivations. Pet. App. 15a.

As a practical matter, corporate directors and officers have no means to protect themselves against this kind of liability. After-the-fact review of virtually any disclosure document, in the contentious environment of a class-action lawsuit, will inevitably generate disagreement over opinions, adjectives and characterizations. And in virtually any case, it is possible for plaintiff's counsel to invite the jury to speculate that some members of a multi-member board of directors acted (at least in part) on unexpressed personal motivations.

Corporate directors and officers faced with sweeping personal liability resting on such a doubtful and unpredictable basis will be placed under severe pressure to include in their proxy statement disclaimers designed to mitigate exposure to damages. The threat of unpredictable liability rulings already has impaired the readability and usefulness of disclosure documents. The Fourth Circuit's decision in this case will worsen that trend. For example, corporate officers seeking to avoid liability of the kind imposed in this case may feel obliged to interject a disclaimer of the following kind:

> In addition to the financial factors discussed in this proxy statement, some members of the Board of Directors may have considered the impact of the merger on their own personal situation, including their continued tenure on the Board of Directors.

This kind of exculpatory rhetoric would do little to assist investors in making rational decisions. The implication that personal ulterior motivations may have played a role in the directors' judgment would, in most instances, be simply wrong, and the disclaimer would be too indefinite to serve any purpose other than minimizing the danger of massive civil liability. The proxy statement used in this case, which advised investors of the *objective fact* that the directors would retain their seats under the merger plan, enabled investors to form their own judgment without engaging in distracting and potentially misleading speculation. Pet. App. 38a, 55a-56a, 59a.

By the same token, the quality of disclosure would be reduced by placing legal pressure on corporate directors to refrain from using adjectives such as the word "independent." The investment banker firm in this case was a prominent, outside, unaffiliated financial advisor, and those circumstances were aptly conveyed by the challenged choice of words. If shareholders wished to discount the investment banker's opinion on the issue of fairness because the banker had been retained by the controlling shareholder, had received information from the controlling shareholder, and had received compensation from the controlling shareholder on a contingent-fee basis, the proxy statement enabled shareholders to make that judgment by setting forth the underlying objective data. Pet. App. 38a, 54a, 55a, 74a, 75a.

This Court warned in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449 (1976), that excessive liability in proxy suits may have adverse effects on the quality of corporate disclosures: "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also substantial liability may cause it to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making." Corporate officers and other persons soliciting proxies (includ-

ing stockholders challenging corporate management in proxy contests) are entitled to precise legal standards that protect against unpredictable personal liability and provide guidance as to what must be disclosed: "imprecision prevents parties from ordering their action in accord with legal requirements." *Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983). Combining large, open-ended personal liability with unpredictable legal standards "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). See also *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 506-507 (1985) (Marshall, Brennan, Blackmun and Powell, J.J., dissenting).[4]

The court of appeals lost sight of these considerations when it sustained liability in this litigation. The practical result of the court's ruling will be to raise compliance costs while undermining the quality of corporate disclosures—results that are directly contrary to the congressional goal of protecting investor welfare while avoiding unnecessary burdens on legitimate business activity.[5]

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[4] The sponsors of the Securities Exchange Act of 1934 made clear that they did not intend such draconian results. See, *e.g.*, 78 Cong. Rec. 7863 (remarks of Rep. Wolverton) (1934) describing Congress's goal as not only protection of investors but also "protection of legitimate business" and observing that "[t]he uppermost thought that has dominated our individual and collective decisions has been a desire to correct existing evils, or conditions that have proved harmful, without destroying, curtailing, or handicapping legitimate business"). Accord, H.R. Rep. No. 1383, 73d Cong., 2d Sess. 3, 13 (1934).

[5] The court of appeals' successive rejection of legal doctrines designed to place reasonable limitations on civil liability poses a serious threat of vexatious litigation. As discussed in the petition for certiorari, the court not only eroded the misrepresentation requirement and discarded any requirement of causation, but also approved collateral estoppel and class action procedures on the broadest possible scale (Pet. App. 8a-11a, 21a-22a). Since federal courts have rejected any requirement of proof of intent to defraud in proxy cases such as this one (*see, e.g., Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 7661, 777-778 (3d Cir. 1976)), a plaintiff seeking a multi-million dollar award of damages in the Fourth Circuit has almost no burden of proof at all. As this Court warned in *Ernst & Ernst v. Hockfelder*, 425 U.S. 185, 215 n.33 (1976): " 'The hazards of business conducted on those terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences' " (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179-180 (1931) (Cardozo, J.)). See also, Sahlman, *Why Sane People Shouldn't Serve on Public Boards*, Harvard Business Review 28 (May-June 1990).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE STATUTES LIMITING CIVIL LIABILITIES OF CORPORATE DIRECTORS*

ARIZONA Ariz. Rev. Stat. Ann. § 10-054(A)(9) (Supp. 1989)	Charter Option
ARKANSAS Ark. Stat. Ann. § 4-27-202(B)(3) (Supp. 1989)	Charter Option
CALIFORNIA Cal. Corp. Code §§ 204(a)(10), 204.5 (West Supp. 1990)	Charter Option
COLORADO Colo. Rev. Stat. § 7-3-101(u) (Supp. 1989)	Charter Option
DELAWARE Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 1988)	Charter Option
FLORIDA Fla. Stat. Ann. § 607.1645 (West 1990)	Self-Executing
GEORGIA Ga. Code Ann. § 14-2-202(b)(4) (1989)	Charter Option

* "Charter option" statutes permit shareholders to curtail or eliminate liability by charter amendment. "Self executing" statutes operate by their own force to curtail liabilities.

IDAHO Idaho Code § 30-1-54(2) (Supp. 1989)	Charter Option
INDIANA Ind. Code Ann. § 23-1-35-1(e) (Burns Supp. 1988)	Self-Executing
IOWA Iowa Code Ann. §§ 491.5(8), 496A.49(13) (West Supp. 1989)	Charter Option
KANSAS Kan. Stat. Ann. § 17-6002(b)(8) (1988)	Charter Option
LOUISIANA La. Rev. Stat. Ann. § 12:24(c)(4) (West Supp. 1990)	Charter Option
MAINE Me. Rev. Stat. Ann. tit. 13-A, § 716 (Supp. 1989)	Self-Executing
MARYLAND Md. Corps. & Ass'ns Code Ann. §§ 2-104(b)(8), -405.2 (Supp. 1989)	Charter Option
MASSACHUSETTS Mass. Gen. Laws Ann. ch. 156B, § 13(b)(1½) (West Supp. 1989)	Charter Option
MICHIGAN Mich. Comp. Laws Ann. § 450.1209(c) (West Supp. 1989)	Charter Option

MINNESOTA Minn. Stat. Ann. §§ 302A.111(4)(u), .251(4) (West Supp. 1990)	Charter Option
MONTANA Mont. Code Ann. § 35-1-202(2)(a)(v), (2)(b) (1989)	Charter Option
NEBRASKA Neb. Rev. Stat. § 21-2035(2) (Supp. 1988)	Charter Option
NEVADA Nev. Rev. Stat. Ann. § 78.037(1) (Michie Supp. 1989)	Charter Option
NEW JERSEY N.J. Stat. Ann. § 17-9A-3(A)(10) (West Supp. 1989)	Charter Option
NEW MEXICO N.M. Stat. Ann. § 53-12-2(E) (Supp. 1989)	Charter Option
NEW YORK N.Y. Bus. Corp. Law § 402(b) (McKinney Supp. 1990)	Charter Option
NORTH CAROLINA N.C. Gen. Stat. (1990) §§ 55-2-02(b)(3), 55-8-30(e)	Charter Option
OHIO Ohio Rev. Code Ann. § 1701.59(D) (Anderson Supp. 1989)	Self-Executing

OKLAHOMA Okla. Stat. Ann. tit. 18, § 1006(B)(7) (West. Supp. 1990)	Charter Option
OREGON Or. Rev. Stat. Ann. § 60.047(2)(c) (1988)	Charter Option
PENNSYLVANIA 42 Pa. Cons. Stat. Ann. § 8364 (Purdon Supp. 1989)	Charter Option
RHODE ISLAND R.I. Gen. Laws § 7-1.1-48(a)(6) (Supp. 1988)	Charter Option
SOUTH DAKOTA S.D. Codified Laws Ann. § 47-2-58.8 (Supp. 1989)	Charter Option
TENNESSEE Tenn. Code Ann. § 48-12-102(b)(3) (1988)	Charter Option
TEXAS Tex. Rev. Civ. Stat. Ann. art. 1302-7.06 (Vernon Supp. 1990)	Charter Option
UTAH Utah Code Ann. § 16-10-49.1 (Supp. 1989)	Charter Option
VIRGINIA Va. Code Ann. § 13.1-692.1 (1989)	Self-Executing

WASHINGTON Wash. Rev. Code Ann. § 23A.12.020(10)(d) (Supp. 1989)	Charter Option
WISCONSIN Wis. Stat. Ann. § 180.307 (West Supp. 1989)	Self-Executing
WYOMING Wyo. Stat. § 17-16-834 (1989)	Charter Option